UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TERRANCE JON IRBY, Plaintiff, v. SKAGIT COUNTY JAIL, et al., Defendants.	)	CASE NO. C06-1836-JCC-MJB REPORT & RECOMMENDATION

INTRODUCTION

Plaintiff, proceeding *pro se* and *in forma pauperis*, has filed an action pursuant to 42 U.S.C. § 1983. He alleges that while he was incarcerated at the Skagit County Jail ("the Jail") in Mount Vernon, Washington, he received inadequate medical care, in violation of the Eighth Amendment to the Constitution. Plaintiff and defendants have filed motions for summary judgment. Having considered the briefs, declarations, and exhibits submitted by the parties, the Court concludes that plaintiff's motion for summary judgment should be denied and defendants' motion for summary judgment should be granted.

BACKGROUND

The declarations submitted by defendants in response to plaintiff's motion for summary judgment, and in support of their own motion for summary judgment, establish the following facts, which, except as noted below, are uncontroverted by plaintiff:

Plaintiff was a pretrial detainee at the Jail on the evening of June 6, 2005, when he was mistakenly given medication intended for another inmate. (Dkt. No. 68, Ex. D at 3). The Jail guard

who dispensed the medication, Chris Dormer, realized his mistake and immediately notified his supervisor. (*Id.*, Ex. B at 1-2). The supervisor then telephoned Dr. Howard Leibrand, the Jail's physician, at Dr. Leibrand's home. (*Id.*). Dr. Leibrand asked what medication had been given to plaintiff and was informed that it was a combination of Ambien, Diphenthydramine, Seroquel, Amitriptyline, and Phentoinal. (Dkt. No. 86, Declaration of Gary Shand, Ex. A "Jail Incident Report"). In Dr. Leibrand's view, this combination "would have been sedating but did not represent a significant risk to the health of [plaintiff], a 47 year old healthy male." (Dkt. No. 86, Declaration of Howard Leibrand at 2). Accordingly, Dr. Leibrand advised the Jail staff to tell plaintiff that he would likely experience a very deep sleep that evening, but there would be no other side effects. To be safe, Dr. Leibrand directed the Jail staff to check on plaintiff every hour. (*Id.*)

Plaintiff asserts that he woke up during the night to go to the bathroom, became dizzy, and fell down, injuring his right thumb. (Dkt. No. 61 at 2). No Jail staff witnessed this accident and plaintiff's support for his account consists only of his own statement and two unsworn statements by other inmates, which defendants contend are inadmissible. (Dkt. No. 68 at 6-7).

In any event, it is undisputed that the next morning, plaintiff reported his injury and was examined by Dr. Leibrand. Dr. Leibrand concluded that plaintiff "may have sprained his wrist and thumb, or that he may have broken one of the small bones in his hand." (Dkt. No. 68, Declaration of Howard Leibrand at 2). Dr. Leibrand ordered x-rays of plaintiff's hand. (*Id.*) However, the x-rays "were negative for visible injuries to the bony structure of his neck, arm, wrist, and hand." (*Id.*) Nor did they reveal any specific injury to the thumb. (*Id.*) Accordingly, Dr. Leibrand prescribed anti-inflammatory and analgesic medication for plaintiff but did nothing more. (*Id.*)

Plaintiff continued to report pain in his thumb, and consequently, in August, 2005, Dr. Leibrand arranged for plaintiff to be seen by an orthopedic surgeon, Dr. Richard Gordon, at Skagit Valley Medical Center. (*Id.* at 3). Dr. Gordon diagnosed plaintiff with a condition known as "trigger thumb." (*Id.*) Dr. Gordon advised against surgery because (1) it was not immediately necessary, and (2) surgery would require a large commitment of resources on the part of Jail staff, in

order to ensure that plaintiff was properly escorted and monitored during and after the procedure. (Dkt. No. 86, Ex. C at 6). Furthermore, Dr. Gordon thought that plaintiff "was very much exaggerating the amount of pain and disability" that he was experiencing. (*Id*.).

Plaintiff continued to report that his thumb bothered him. (Dkt. No. 68, Declaration of Howard Leibrand at 3). Dr. Leibrand consequently asked David Jones, the Medical Liaison Deputy at the Jail, to contact the Washington Department of Corrections ("DOC") and find out whether it might arrange the surgery. (*Id*.) Jones sent an email message in December, 2005, to an official at the DOC describing plaintiff's diagnosis and asking whether DOC might assist "by having the surgery done where appropriate and recovery done at a secure facility[.]" (Dkt. No. 61, Ex. G). Jones also stated that Dr. Leibrand "is saying that we should have the surgery done." (*Id*.)

Dr. Leibrand denies that he told Jones that he favored surgery. In his declaration filed in support of defendants's motion for summary judgment, Dr. Leibrand states that Jones's email message "is inaccurate insofar as it reports both myself and Dr. Gordon as saying that surgery 'should' be done in the sense of surgery being deemed by either of us as necessary to alleviate any significant pain." (Dkt. No. 68, Declaration of Howard Leibrand at 3). Dr. Leibrand states that after having examined plaintiff, seen x-rays of his hand, and heard Dr. Gordon's opinion, he advised Gary Shand, the Chief of Corrections for Skagit County, that plaintiff's condition "would likely benefit more from continuing treatment with anti-inflammatories than any of the alternatives, and surgery was not warranted at that time." (*Id*. at 4). According to Dr. Leibrand, trigger finger does not deteriorate into a more serious condition. (*Id*.)

DOC apparently did not offer to provide the surgery for plaintiff's thumb. In September, 2007, after plaintiff had been transferred to DOC custody at the Washington State Penitentiary, plaintiff was examined by DOC medical staff. He was injected in the hand with a steroid to alleviate his symptoms. (*Id*.) The record does not disclose any further treatment

On December 26, 2006, plaintiff submitted the instant complaint pursuant to 42 U.S.C. §1983. (Dkt. No. 1). The Court twice granted plaintiff leave to amend his complaint to cure

deficiencies. On March 2, 2007, the Court dismissed two defendants and directed the Clerk to serve the complaint on the remaining defendants. (Dkt. No. 15). Defendants filed their answer on May 2, 2007. (Dkt. No. 28).

The Court issued an Order on June 4, 2007, setting deadlines for discovery and dispositive motions. (Dkt. No. 37). On plaintiff's motion, the Court extended these deadlines on July 19, 2007. (Dkt. No. 52). Plaintiff filed a motion for summary judgment on October 9, 2007. (Dkt. No. 61). Defendants filed a response (Dkt. No. 68) and then their own motion for summary judgment on December 6, 2007. (Dkt. No. 86). Plaintiff filed a response (Dkt. No. 88), defendants filed a reply (Dkt. No. 91), and the parties' summary judgment motions are now ready for review.

DISCUSSION

Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986). The court must draw all reasonable inferences in favor of the non-moving party. *See F.D.I.C. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev'd on other grounds*, 512 U.S. 79 (1994). The moving party has the burden of demonstrating the absence of a genuine issue of material fact for trial. *See Anderson*, 477 U.S. at 257. Mere disagreement, or the bald assertion that a genuine issue of material fact exists, no longer precludes the use of summary judgment. *See California Architectural Bldg. Prods., Inc., v. Franciscan Ceramics, Inc*., 818 F.2d 1466, 1468 (9th Cir. 1987). In addition, "[w]hen the nonmoving party relies only upon its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact." *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

As a pretrial detainee, plaintiff's claim of inadequate medical care is governed by Supreme Court decisions interpreting the Eighth Amendment in the prison context. *See Johnson v. Meltzer*, 134 F.3d 1393, 1398 (9th Cir. 1998). These cases establish that denial of medical attention to

prisoners constitutes an Eighth Amendment violation only if the denial amounts to *deliberate indifference* to serious medical needs of the prisoners. *See Toussaint v. McCarthy*, 801 F.2d 1080, 1111 (9th Cir. 1986) (emphasis added). In *Farmer v. Brennan,* 511 U.S. 825 (1994), the Supreme Court defined a strict standard which a prisoner must meet in order to establish "deliberate indifference." Mere differences of opinion, negligence or even recklessness concerning the appropriate treatment is insufficient. 511 U.S. at 835-37. Rather, a prison official is liable only if he knows that plaintiff faces "a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id.* at 847. In general, expert opinion is necessary to establish a claim of deliberate indifference. *See Hutchinson v. United States,* 838 F.2d 390 (9th Cir. 1988)

Here, plaintiff simply has not shown that a triable issue of fact exists that would hold defendants liable under this standard. He has submitted no evidence, other than his own statements, that support his claim that his injury has worsened since the incident. Defendants, on the other hand, have submitted uncontroverted evidence that plaintiff received medical attention following the injury to his thumb. It is, of course, regrettable that plaintiff was given the wrong medication by Jail staff, which, accepting plaintiff's statements as true, precipitated his fall and injury. However, the inadvertent delivery of the wrong medication was at most, under the record presented here, an act of negligence. As such, it does not rise to the level of a constitutional violation. *See* 511 U.S. at 835-37. While the government has an obligation under the Eighth Amendment to provide medical care for those in its custody, not every breach of that duty is of constitutional proportions. *See Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc).

Accordingly, the Court concludes that plaintiff has not satisfied his burden of showing that a genuine issue of material fact exists regarding his claim that defendants provided inadequate medical care. Plaintiff's additional claim that the Jail failed to properly train its staff, is premised upon an initial finding of inadequate medical care. Because plaintiff fails to meet his burden regarding this initial finding, his remaining claim also fails. Consequently, the Court recommends that plaintiff's motion for summary judgment be denied and that defendants' motion for summary judgment be

granted.

CONCLUSION

For the foregoing reasons, the Court recommends that plaintiff's motion for summary judgment be denied, that defendants's motion for summary judgment be granted, and that this action be dismissed with prejudice. A proposed Order accompanies this Report and Recommendation.

DATED this 23rd day of January, 2008.

MONICA J. BENTON
United States Magistrate Judge